No. 87-1213

In The
Supreme Court of United States
October Term, 1987

BAJA CONTRACTORS, INC. et al,

Petitioners,

vs.

THE CITY OF CHICAGO, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF ADDRESSED TO ARGUMENTS FIRST RAISED IN RESPONDENTS OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 22.5, this brief is addressed to arguments first raised in the brief in opposition to the petition for certiorari.

1. This case, dealing solely with the due process requirements which must be followed by a municipality that adopts an MBE

program, is an ideal companion to Richmond, Virginia v. J. A. Cronson Co., 822 F.2d 1355 (4th Cir. 1987), cert. granted, No. 87-998, 56 U.S.L.W. 3555 (2/23/88), dealing with the appropriate circumstances and methods under which municipalities, consistent with constitutional limitations, may create MBE programs.

2. Because the City program at bar is totally devoid of due process and the Seventh Circuit decision so materially inconsistent with the Court's teaching in Mathews v. Eldridge, 424 U.S. 319 (1976), the City has chosen to defend its unconstitutional conduct through an attack on opposing counsel.

3. On the facts at bar, City inspectors twice visited Baja's facility, reached conclusions and reported those conclusions to an MBE Certification Committee which met in secret to deny the application. Baja was never informed of the facts supporting the

conclusions and never given an opportunity to rebut them. Respondent's statement that Baja's attorney was "told that the domination and control of Baja by Material Service, the largest concrete supplier in the Chicago area, was the major reason for the denial of the application since Baja appeared to be acting as a front for a non-minority business" (Br. 5)*/ is not supported by the record.

4. In light of the competitive advantage provided by MBE participation, the burgeoning development of MBE programs throughout the nation and constitutional basis on which they stand, the degree of procedural due process which municipalities must provide before destroying a business is "an important question of federal law which has not been, but should be, settled by this Court" within the contemplation of Sup.Ct.R. 17(c).

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*/ "Br." represents Respondent's Brief in Opposition to the Petition for Certiorari.

Contrary to Respondents' assertion, the issue is neither fact intensive (except to the extent that any procedural due process question is) nor subject to the limitations that preclude consideration of interlocutory orders on certiorari.

5. Because the district court found that "the amorphous, the standardless, procedures now followed, creates the risk of effectively unreviewable error" (5/14/86, Tr. 29), the Seventh Circuit decision, if left to stand, will allow Chicago and other cities to administer their MBE programs on the basis of political and patronage considerations rather than in accordance with benevolent objectives for which they were created.

6. In an effort to camouflage the real issues at bar, Respondents focus their attack on undersigned counsel. They do so on two separate theories: (a) the undersigned firm "is simultaneously representing the City on

other substantial matters" (Br. 13) and (b) an associate in the firm, when working as an Assistant City Attorney, had certain responsibilities with respect to the creation of the City's MBE program. (Br. 14).

7. The "other substantial matters" to which respondents refer is in fact one unrelated lease negotiation. In light of these circumstances, Respondent's interpretation of DR 5-165(B) is incorrect as a matter of law. An attorney is not prohibited from bringing a lawsuit against a client who has retained him to do unrelated transactional work "if there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation." Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976). Respondents references to out-of-context language from a number of cases is misleading; their principal authorities refuse "to

enunciate a per se rule that a client must forego in all circumstances his choice of a particular attorney merely because there is the foreseeability of a future conflict with one of the attorney's existing clients." Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1349 (9th Cir. 1981) (upholding refusal to disqualify firm that had sued its own client).

8. Rather, as a general rule, "simultaneous representation of two such clients is not at all improper if their interests are not inconsistent as against one another and if confidential information received by the attorney from one client is not subsequently used against him while the attorney is working on behalf of the other client." Grove v. Grove Regulator Company, 213 Cal.App. 64, 29 Cal.Rptr. 150 (1963); see City Council of Honolulu v. Sakai, 58 Hawaii 390, 570 P.2d 565 (1977) (in the absence of

misuse of confidential information, law firm may represent City Council as well as sue City on behalf of other clients in unrelated matters).

9. Moreover, although the undersigned firm represents numerous clients in pending cases involving the City, this is the first instance in which disqualification has been requested. While more sophisticated public law officers (such as the Illinois Attorney General) have explicit written regulations governing when outside counsel retained by a public body may sue public agencies or officers, the Chicago Corporation Counsel, to our knowledge, has none. Thus, this situation is similar to that in City of Cleveland v. Cleveland Electric Illuminating Co., 440 F.Supp. 193 (N.D. Ohio 1976), aff'd. mem., 573 F.2d 1310 (6th Cir 1977), cert. denied, 435 U.S. 996 (1978), where the court declined to disqualify a law firm that acted as bond

counsel for the City of Cleveland from representing a private client in a case brought by the City on estoppel grounds as well as the lack of a substantial relationship between the two matters.

10. Respondents also claim that disqualification under DR9-101(B) is required because an associate in the undersigned firm, while an Assistant City Attorney, "had responsibility for supervising the drafting of vital aspects of the City's MBE program." (Br. 14). This contention is disingenous for a number of reasons.

First, the record reference is not to the testimony of the involved attorney (who was not asked what his role was) but to the testimony of a ~~city~~ attorney who indicated that the division which the lawyer administered had supervisory authority for drafting the Executive Order that created the MBE program. However, this case does not

challenge the Executive Order as written; it challenges the City's failure to adopt the regulations required by the Order to assure procedural regularity.

Second, in these circumstances, the courts are concerned with the former government attorney's access to confidential information. If there is a substantial relationship between his public sector activities and the subject matter of a pending trial, the courts recognize a presumption of the receipt of confidential information which may be rebutted. See, e.g., LaSalle National Bank v. County of Lake, 703 F.2d 252, 256 (7th Cir. 1983). This multiple level inquiry has no application to the appellate level where the analysis is limited to facts of record. In any event, the district court accepted trial counsel's representation that the attorney would not be asked about any "confidences and secrets" acquired when he

worked for the City and indicated that "I would not let him do it anyway." (5/5/86; Tr. 190).

Third, DR5-105(D), requiring a law firm to disqualify itself from a matter in which one of its attorneys is disqualified, does not apply if the former government attorney has been screened from any direct or indirect participation in the matter. ABA Formal Opinion 342, at 11 (11/24/75); see also Ill. State Bar Ass'n., Professional Ethics Opinion 811 (1982)(firm is not disqualified so long as former government attorney did "not work on such matters in any way for his law firm or otherwise use any knowledge he gained for the benefit of the firm"). While it is theoretically unnatural to apply these trial related considerations to a matter pending in this Court, it is safe to say that the former Assistant City Attorney has not (and will not

be) involved in the presentation of the case at bar.

11. The undersigned firm could not be involved in the trial of this case for one reason: Under DR 5-102, when it is apparent that a lawyer in the firm is an essential witness on behalf of the client, the firm "shall withdraw from the conduct of the trial...." The Rule specifically applies to trials. "[N]either the model code nor the model rules prohibit the lawyer from assisting substitute counsel in the appeal. Indeed, the lawyer may also appear as counsel of record on the brief and may argue the appeal [when the lawyers trial testimony is not an issue on appeal.]" ABA Informal Opinion 83-1503 (10/30/83).

12. Aside from the trial disqualification (which was recognized ab initio and voluntarily below), there is no cognizable basis for disqualification in this

case. "[D]isqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary." Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982). Accordingly, the federal courts have authorized disqualification only "(1) where an attorney's conflict of interest in violation of [the Code of Professional Responsibility] undermines the court's confidence in the vigor of the attorney's representation of his client, or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation...., thus giving his present client an unfair advantage." Board of Education of New York City v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (citations

omitted). Neither of these situations apply to the instant case in any conceivable way.

13. In a case before this Court, involving legal questions of profound national significance on a fully developed record, the considerations that give rise to disqualification are inapposite. There is simply no risk that an attorney's conduct will "'taint the underlying trial' by disturbing the balance of the presentations...." Nyquist, 590 F.2d at 1246, quoting, W.T. Grant Co. v. Haines, 531 F.2d 671, 678 (2d Cir. 1976).

14. Therefore, respondents' contention that the Court "need not exercise its discretionary certiorari jurisdiction in favor of such unethical conduct" (Br. 14) is no more than a subterfuge for the avoidance of an exceptionally weak position on the merits. It falls squarely within the generally recognized proposition that "disqualification motions are often interposed for tactical reasons."

Nyquist, 590 F.2d at 1246; see Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir 1977). The suggestion that fanciful (and wholly incorrect) notions of disciplinary infractions provide a reason for this Court to refuse to consider a significant issue of constitutional magnitude is as unseemly as it is untenable.

CONCLUSION

For these reasons, as well as those stated in our original petition, a writ of certiorari should be granted to review, and ultimately reverse, the decision below.

Respectfully submitted,

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